



# Minnesota Counties Insurance Trust

## RESOURCE BRIEFING: VETERANS' PREFERENCE ACT February 2001

*\*Please be advised that this entire document is intended for general information purposes only and does not constitute legal, coverage or risk management advice relative to a specific situation*

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### INTRODUCTION

Minnesota's Veterans' Preference Act (Minn. Stat. 197.46 *et seq.*) was enacted to provide public employment benefits and protections to veterans of military service. The Legislature established these statutes recognizing that the "training and experience in the military services . . . and loyalty and sacrifice for the government are qualifications of merit which can not be readily assessed by examination." The Veterans' Preference Act provides veterans with security in public employment and also protection from the "ravages and insecurity of a political spoils system."

This *Resource Briefing* examines the applicability of veterans' preference laws when hiring, promoting, terminating, demoting or suspending a veteran. It also provides a review to the veterans' hearing and appeals processes that may be available.

### WHO IS A VETERAN?

The term "veteran" means a citizen or resident alien of the United States who has separated under honorable conditions from any branch of the armed forces of the United States if:

- he or she has either served on active duty for 181 consecutive days,
- has been disabled while serving on active duty
- has active service as a reservist.

In all cases, the United States Secretary of Defense must certify the active service and the honorable discharge of the veteran.

### APPLYING VETERANS' PREFERENCE

An applicant for hiring or promotion may invoke special points for consideration during the hiring or promotion process. Veterans' Preference also provides protection from removal or wrongful termination by a public employer.

Veterans' Preference applies to all public employers, including counties, cities, towns, school districts, or other municipalities or political subdivisions of the State of Minnesota, that recruit or employ veterans.

Veterans' Preference applies to positions in government **except** the positions of private secretary, ~~teacher~~, superintendent of schools, or one chief deputy of any elected official or head of a department, elected officials, temporary employees or any person holding a strictly confidential relation to the appointing officer.

## **HIRING OR PROMOTING A VETERAN**

### ***TESTING***

The public employer must apply the Veterans' Preference laws during the hiring process. **Regardless of the system selected to identify qualified applicants for an interview, preference points must be assigned.**

When the employer administers a written, formal test as part of the hiring process the law requires the test be rated on an 100 point scale. A veteran who achieves a passing score on the test is given an additional 5 points added to the passing score. A disabled veteran is entitled to have 10 additional points added to the passing score. (A disabled veteran is defined as a person who has a compensable service connected disability as adjudicated by the United States Veterans Administration, or by the retirement board of one of the several branches of the armed forces.) Preference points are added **only** when the applicant receives a passing grade. The applicants **must** request the preference. Finally, a determination as to the veteran's disability status **must** be made and verified before awarding additional disability points.

The veteran must request that Veterans' Preference points be applied to the passing score. The public employer should have a place on the application for the veteran to request Veterans' Preference. It should also indicate that proof of veteran or disabled veteran status may be required before preference will be granted.

**An employer may request a copy of the applicants DD214 form before granting veterans preference rights to them. Employers should reference this requirement on the job application.**

The additional points for Veterans' Preference cannot be used to alter a failing score to a passing score. If the test requires a score of 70 points to pass and the veteran scores a 68 no preference points are added. If the veteran scores a 70 then the score is increased to 75 (or 80 in the case of a disabled veteran).

It is important to note that the public employer is not limited to the administration of a formal, written, 100-point test. The appointing authority has broad discretion to determine what criteria will be considered in awarding the 100 points. It may be based entirely on the job application, a written test, an oral examination, skills test or a combination of factors. The public employer may administer any type of evaluation so long as it is based on criteria capable of being reduced to a 100 point rating scale.

Regardless of the evaluation system adopted the public employer should articulate objective criteria on which the initial evaluation is based prior to accepting applications. The criteria must be based upon the actual job duties. An up-to-date job description is critical in determining the criteria that are utilized. The maximum number of points out of a total of 100 for each category must be determined in advance of the testing and must be awarded in a uniform manner. (These requirements are critical in many areas of employment law beyond the application of Veterans' Preference).

**Veterans' Preference may be used by the surviving spouse of a deceased veteran and by the spouse of a disabled veteran who because of the disability is unable to qualify when making an application for employment.**

### ***INTERVIEWING***

Veterans' Preference points are awarded when it is determined the applicant meets the minimum qualifications for the job. This increases the likelihood that the veteran will be interviewed. The

Veterans' Preference Act does not provide absolute preference for veterans. Veterans' preference credit may increase the chance that a veteran will receive an interview however, there may be instances that even with the preference points the applicant falls short of points determined necessary for an interview. When this occurs the public employer is not obligated to interview the veteran.

If there are 40 applicants who achieve a score of 95 a veteran with a score of 75 will not likely receive an interview for the position. The additional points will move the veteran up on the scale, but do not guarantee that the veteran will be at or near the top score.

Whenever a public employer fails to hire a veteran who has received veteran's preference, the employer is required to notify the veteran in writing of the reasons for rejection.

### ***PROMOTION***

Veterans' Preference laws provide that 5 points are added to the competitive promotional examination rating of a disabled veteran. This veterans' preference **only** applies to disabled veterans who, at the time elect to utilize the preference is entitled to disability compensation for a permanent service related disability rated at 50% or more.

**A disabled veteran can use the promotional preference only one time and only in the securing of the first promotional position after securing public employment.**

### ***SENIORITY***

The law requires that a promotional candidate with a rating augmented by veterans' preference be entered on an eligibility list ahead of a non-veteran with the same rating. Once the eligibility list is compiled, Veterans' Preference contains no guarantees as to seniority. The law addresses only the issue of veteran's ranking on an eligibility list. That is, a veteran hired at the same time as a non-veteran will be entitled to greater seniority by virtue of Veterans' Preference. Additionally, an employer which defines seniority by training date, rather than date of hire, is not in violation of the act as long as the veteran received preference points and was correctly ranked on the list of eligible candidates.

## **DISCIPLINE AND DISCHARGE**

### ***SUSPENSION***

A veteran cannot be suspended without pay pending a determination of the charges under which they were proposed for termination. However, the public employer may suspend a veteran with pay pending a determination of the charges under which they were proposed for termination. A suspension of more than 30 days is considered to be a discharge for purposes of the Veterans' Preference laws.

**A disciplinary suspension without pay which is unconnected to a discharge proceeding does not constitute a "removal" under the act, and is therefore permissible and no veterans' preference act hearing rights exist.**

### ***TERMINATION OR DEMOTION***

No veteran employed by a political subdivision "shall be removed from such position or employment except for incompetence or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." Removal from a position or employment has been interpreted to mean discharge, suspension or demotion. In scrutinizing this standard, the Minnesota Supreme Court has held there is no significant difference between the "incompetence or misconduct" standard required by the act and the "just cause" standard identified in other public employment statutes and incorporated in most collective bargaining agreements.

The courts have held that the employer is required to establish that the veteran's actions alleged to constitute misconduct or incompetence:

- relate to and affects the administration of the position,
- are of a substantial nature directly affecting the rights and interests of the public.
- touch the qualifications of the position and the performance of the veteran's duties.
- establish the veteran is not fit and proper.
- do not fit the position.

### ***NON-DISCIPLINARY LAYOFF OR DEMOTION***

A public employer may layoff or demote a veteran, without a showing of incompetence or misconduct, where the veteran is the least senior employee and the position is abolished. The employer, however, cannot abolish the position and assign duties to other less senior positions as subterfuge to avoid a veteran's right to a hearing.

A layoff notice should state that the employee has 60 days to petition the district court for a writ of mandamus compelling reinstatement and back pay if they believe that the layoff is being used to avoid rights under the Veterans Preference Act. The notice should also state that the veteran has the alternative right to petition the Commissioner of Veterans Affairs for a hearing on the matter.

When a position is abolished in good faith, an employer's failure to give notice of a veteran's right to challenge the layoff tolls the 60 day period for the veteran to petition for a hearing. It does not entitle the veteran to back pay from the date of abolition to the date the veteran receives notice of the veterans preference rights.

A hearing on the issue of abolition of position may lead to an order to reinstate the veteran employee. Reinstatement is appropriate only when it is established that the abolition of the veteran's position was not in good faith.

## **VETERANS' PREFERENCE HEARING AND APPEALS PROCESS**

According to the Veterans' Preference Act, a public employer that wishes to remove a veteran from employment must notify the veteran of the intent to dismiss. Elements of the notice must include:

- statutory grounds for the proposed termination/demotion;
- factual basis for the proposed termination/demotion;
- state that, pursuant to the Veterans' Preference laws, the employee may have the right to request a hearing within sixty (60) days of receipt of the notice.
- state that if the employee fails to request a hearing within the sixty (60) day period, the employee's right to a hearing and other legal remedies for reinstatement will be waived.
- state that the hearing will be before a neutral panel.

Failure of the public employer to provide a discharge veteran of this notice indefinitely extends the 60-day limitation period for requesting the hearing. **During this 60-day period the public employer is obligated to compensate the veteran.** If the veteran chooses to appeal, compensation continues until final disposition is made. If the veteran fails to request a hearing within sixty (60) days of receiving the notice, the veteran's right to a hearing is waived, as are all other remedies for reinstatement under the Veterans Preference Act.

The notice of a possible right to a veteran's hearing should be included with every discharge. If the employee is not a veteran they cannot invoke the statutory rights, but failure to provide the notice may expose the employer to unlimited liability if the employee is a veteran.

### ***HEARING***

The law provides that the veteran has the right to a hearing before a neutral body prior to discharge from employment. The hearing panel may consist of a civil service commission, the Merit System, the Personal Board of Appeals appointed pursuant to the County Personnel Act, a grievance arbitration panel (if the employee agrees to have the decision of the arbitrator apply as the veteran's hearing) or

some other panel authorized by statute. If no such panel is in place then the appeal is heard by an ad hoc panel. Selection of the ad hoc panel provides that:

- each party appoints a person to the panel. The two panel members then jointly choose a third member. If they are unable to decide upon the third member, the parties may have the district court judge appoint the third panel member.
- failure or refusal by the veteran to choose a panel member, resulting in the delay of the hearing, may preclude the veteran from receiving an award of back pay.

When public employers have failed to limit remedies available to veterans, veterans who are covered by a collective bargaining agreement may have a right to a Veterans' Preference Hearing **AND** to arbitration under terms of the agreement. If the veteran is a member of a bargaining unit, the employer and the veteran may agree to have an arbitrator serve as the veterans' preference hearing officer. The collective bargaining agreement may also limit the employee's access to the grievance procedure if the veteran elects to proceed under the statute. The agreement cannot limit the veteran's access to the statutory process.

Each side may conduct discovery in preparation for the process. Within 10 days of the demand from the other side, a party is obligated to disclose:

- Names and addresses of all witnesses with a brief summary of testimony.
- Any statements of the parties or witnesses.
- All other discovery material available through the rules of civil procedure.

### ***DUTY OF THE VETERANS' PREFERENCE HEARING BOARD***

After hearing testimony and examining evidence the hearing panel may fashion a remedy other than the action proposed by the employer. If the hearing panel finds incompetence or misconduct and that the employer acted reasonably, it may only modify the proposed penalty upon substantial evidence of extenuating circumstances that justify a lesser penalty.

**Minnesota courts have found, in interpreting the Act, the board is implicitly authorized to fashion a remedy other than that of the employer, if the evidence presents extenuating circumstances. Extenuating circumstances could be such things as family problems, illness or disability.**

### ***FINDINGS***

The decision of the hearing panel must be made in writing. The decision must include findings of fact, conclusions of law and a detailed listing of extenuating circumstances relied upon in modifying the disciplinary sanction if the panel concluded that modification was proper. This determination must be made upon substantial evidence in the record.

The veteran may appeal the findings of the hearing panel to the district court. The appeal must be in writing and state the grounds of the appeal. The employer must be served with notice to appeal within 15 days of the decision and it must be filed with the court administrator within 10 days after service upon the employer. (The employer may appeal the decision, but only on the very limited basis that the panel exceeded its authority granted by statute or engaged in misconduct that significantly impacted its decision.)

### ***JUDICIAL REVIEW OF THE PANEL DECISION***

The question before the reviewing court is whether the hearing panel abused its discretion. On appeal, the factual findings must be upheld if they are supported by substantial evidence on the record however, the district court is free to exercise its independent judgment.

## ***APPELLATE PROCEDURES***

The right of appeal from a district court mandamus order pursuant to Minn. Stat. 197.46, or from an order of the Commissioner pursuant to Minn. Stat. 197.481, is to the Court of Appeals. A petition for writ of certiorari by an aggrieved party for judicial review must be filed with the court of appeals and served on the agency not more than thirty (30) days after receipt of the agency's final decision and order.

If a request for reconsideration is made within ten days after the Department of Veterans' Affairs decision and order, the 30 -day period will not begin to run until disposition of the application for reconsideration.

## **PENALTIES AND COSTS**

The willful disregard of veterans' preference laws may constitute a misdemeanor by the public employer. An aggrieved veteran can also petition the Commissioner of Veterans' Affairs for relief. Under the Act, a wrongfully discharge veteran is entitled to compensation. Even if the discharge is upheld the veteran is entitled to compensation through the hearing decision of the hearing panel. If reinstated the veteran is entitled to backpay and benefits.

The employer is responsible for all costs of the hearing process regardless of whether or not it prevails.

## **CONCLUSION**

The Veterans' Preference Act provides preference for veterans applying for public employment. It also extends protections when the employer's actions may affect a veteran's employment status. The Minnesota Counties Insurance Trust does not extend coverage for claims arising out of failure to comply with the Act. However the MCIT recognizes the risks that exist for its members. This publication has attempted to provide advice on complying with the Act. The Veterans' Preference Act represents an important part of personnel law in Minnesota. If you have questions related to this topic contact your county attorney, labor attorney or the Minnesota Counties Insurance Trust.

***Please be advised that this entire document is intended for general information purposes only and does not constitute legal, coverage, or risk management advice relative to a specific situation.***

### **SAMPLE NOTICE OF REJECTION OF VETERAN**

Dear Candidate:

This letter is to inform you that you have not been selected for the position of \_\_\_\_\_, for which you applied. The reason you were not selected for the position was that:

(another finalist was chosen based upon the final interview)

(another finalist was chosen on the basis of the score received on the competitive examination)

(another finalist was chosen based upon the score received on the evaluation of the applicant's experience and training)

You were awarded \_\_\_\_\_ points based upon your status as a (veteran)(disabled veteran)(eligible spouse of a veteran).

Thank you for your interest in employment with \_\_\_\_\_.

Best wishes,

Personnel Director

Cc:      Applicant file for position of \_\_\_\_\_

## SAMPLE LAYOFF NOTICE

RE: Notice of Layoff

Hand Delivered

Dear Employee:

You are hereby notified that employer intends to place you on layoff from your position as position, effective date.

If you are an honorably discharged veteran, you may have certain rights relating to your layoff under the Minnesota Veterans Preference Act. Pursuant to the Act, you have the right to either petition the District Court for a writ of mandamus, Minn. Stat. 197.46, or petition the Commissioner of Veterans Affairs pursuant to Minn. Stat. 197.481 for a hearing, to determine whether your layoff was in good faith. If you choose to take either of these actions, you must do so within sixty (60) days of receipt of this notice. Your failure to do so within sixty (60) days shall constitute a waiver of your rights to contest your layoff under the Veterans Preference Act. If you have any questions, please contact me.

Best wishes,

Personnel Director

Cc: Employees Personnel File



## SAMPLE TERMINATION NOTICE

RE: Notice of Intent to Discharge

Hand Delivered

Dear Employee:

You are hereby notified that Employer intends to remove you from your position as position. The statutory ground(s) for your proposed discharge is/are:

(incompetence) (and) (misconduct)

The specific factual grounds for your proposed discharge, based on the information currently available, include but are not limited to:

(set forth specific facts)

Pursuant to the Veterans Preference Act, Minn. Stat. 197.46, if you are an honorably discharged veteran you have the right to request a hearing on your removal within sixty (60) days of receipt of this notice. Your request for a hearing must be made in writing to employment office. Failure to timely request a hearing within this sixty (60) day period shall constitute a waiver of the right to a hearing. Such failure shall also waive all other available remedies for reinstatement to your position.

(You are hereby suspended with pay pending the outcome of the discharge proceedings)

(You must provide employer with a copy of your DD214 form establishing that you are an eligible, honorably discharged veteran. Please forward the necessary proof to my attention within five (5) days of receipt of this notice.)

If you have any questions, please contact me.

Best wishes,

Personnel Director

Cc: Employee's Personnel File

## SAMPLE JOB APPLICATION QUESTION

Are you an honorably discharged veteran of the armed forces of the United States or are you otherwise eligible to claim Veteran's Preference Points? Yes\_\_\_ No\_\_\_

Do you wish to claim Veterans' Preference Points? Yes\_\_\_ No\_\_\_

**If you checked yes you must provide the employer with a copy of your DD214 form before the preference points will be granted.**

If you are a disabled veteran or otherwise entitled to claim disabled veterans preference points and wish to claim such additional points, please check here. \_\_\_\_\_